

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION FOUR

ABM INDUSTRIES OVERTIME CASES

JCCP No. 4502

A132387, A133077 & A133695

(City & County of San Francisco  
Super. Ct. No. CJC-07-004502)

Respondent ABM Industries, Inc. (collectively with related respondents, ABM) is a large facility services company with employees throughout the United States, including thousands of janitorial workers at hundreds of job sites in California. Appellants (referred to herein as plaintiffs) are present or former ABM janitorial employees. On behalf of themselves and similarly situated Californians, plaintiffs filed their complaint in this coordinated proceeding in September 2007, alleging that ABM violated California labor laws by, among other things, failing to properly record and compensate employees for meal breaks; requiring employees to work split shifts without appropriate compensation; and failing to ensure that employees were reimbursed for expenses incurred when traveling between work sites. In June 2010, plaintiffs moved for class certification of a general class of ABM workers and various subclasses of such workers who had been subjected to particular wage and hour violations. After briefing and argument, the trial court found plaintiffs' expert evidence inadmissible and indicated orally that it was denying the class certification motion. In response, plaintiffs filed a

motion pursuant to Code of Civil Procedure section 473, subdivision (b) (the 473(b) motion), attempting to supplement the evidence previously provided with respect to the qualifications of their expert. By order dated June 29, 2011, the trial court denied plaintiffs' 473(b) motion. Thereafter, on September 1, 2011, the trial court issued its written order, formally denying plaintiffs' class certification motion. We conclude that the trial court's wholesale exclusion of plaintiffs' expert evidence in this case was error. We further determine that the trial court's refusal to grant class certification on these facts was an abuse of discretion, and therefore reverse.

## **I. BACKGROUND**

### **A. *Facts Underlying the Consolidated Complaint***

ABM's numerous California janitorial employees work at customers' workplaces scattered throughout the state. ABM's job sites in California are organized into two regions (Northern California and Southern California), various branches within a region, and dozens of distinct districts within a branch. A district is a number of buildings within a geographic area. Each branch is under the supervision of a different branch manager. Employees report to an individual site supervisor, who in turn reports to the branch manager. According to ABM, the site supervisor is responsible for "the daily operations of the location, including assurance that employees are paid properly and provided with their meal and rest breaks . . . ." However, it appears that ABM's wage and hour policies are controlled centrally and thus applied uniformly throughout all janitorial job sites. In addition, ABM pays all of its employees through use of a single software application, the Labor Management System (LMS).

ABM provides janitorial services to clients under contracts obtained through competitive bidding. According to ABM, "[t]he low cost of entry in the facility services business has led to strongly competitive markets comprised of a large number of mostly regional and local owner-operated companies, primarily located in major cities throughout the United States." In order to compete, ABM provides various contracts at agreed-upon prices. For instance, ABM provides a fixed price contract where "the client agrees to pay a fixed fee every month over a specified contract term." Under the cost-

plus arrangement, “the clients reimburse [ABM] for the agreed-upon amount of wages and benefits, payroll taxes, insurance charges and other expenses associated with the contracted work.” Given the fixed-price nature of these contracts, it is ABM, not the customer, who is responsible for higher labor costs if their employees cannot finish their assigned work within budgeted timeframes. As Faisal Algaheim, ABM’s Regional Operations Manager for Northern California, testified: “The customer paid the contracted amount; the contracted price. And if it is a fixed job—which means the customer will only pay us a contracted amount—whether we work more or less, it is our problem to maintain the cleaning specifications, and pay the employees currently.”

All of ABM’s non-exempt janitorial employees, who provide the services under these contracts, are entitled to the benefits prescribed by California’s labor laws and the related wage orders promulgated by the Industrial Welfare Commission (Wage Orders). For instance, “[p]ertinent meal period provisions require that ‘[n]o employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes . . . .’ (Cal. Code Regs., tit. 8, § 11050, subd. 11(A).) ‘[A]n employer’s obligation is to provide a first meal period after no more than five hours of work and a second meal period after no more than 10 hours of work.’ (*Brinker [Restaurant Corp. v. Superior Court* (2012)] 53 Cal.4th [1004,] 1049 [*Brinker*].) To qualify as a lawful meal break under California law, an employee must be relieved of all duties for an uninterrupted 30 minutes. (*Id.* at p. 1040; Cal. Code Regs., tit. 8, § 11050, subd. 11(A).) If an employer fails to comply with these requirements it must pay one hour of pay at the employee’s regular rate ‘for each workday that the meal period is not provided.’ (Cal. Code Regs., tit. 8, § 11050, subd. 11(B); see Lab. Code, § 226.7, subd. (c).)” (*Alberts v. Aurora Behavioral Health Care* (2015) 241 Cal.App.4th 388, 400 (*Alberts*).) We refer to any extra hours of wages potentially due to employees under the labor laws as premium pay.

Similarly, pursuant to Wage Order 5-2001(4)(C): “When an employee works a split shift, one hour’s pay at the minimum wage shall be paid in addition to the minimum wage for that workday . . . .” (See Lab. Code, § 1197 [“The minimum wage for

employees fixed by the commission or by any applicable state or local law, is the minimum wage to be paid to employees, and the payment of a lower wage than the minimum so fixed is unlawful.”]; see also *id.*, §§ 1194, subd. (a) & 1194.2 [allowing civil action for recovery of unpaid wages].) For purposes of this requirement, “split shift” is defined to mean “a work schedule which is interrupted by non-paid non-working periods established by the employer, other than bona fide rest or meal periods.” (Wage Order 5-2001(2)(R).) Although the Wage Order does not define “bona fide meal period,” the Division of Labor Standards Enforcement (DLSE) has historically taken the position that a bona fide meal period “is one that does not exceed one hour (60 minutes) in length.” (DLSE Of Counsel H. Thomas Cadell, Jr., letter to Paul K. Schrieffer, Dec. 11, 2002.)<sup>1</sup>

Finally, California law requires employers to fully reimburse employees for expenses actually and necessarily incurred in the discharge of their duties, including automobile expenses. (Lab. Code, § 2802; *Gattuso v. Harte-Hanks Shoppers, Inc.* (2007) 42 Cal.4th 554, 569 (*Gattuso*).) This right to reimbursement cannot be waived. (*Gattuso, supra*, 42 Cal.4th at p. 561.) However, an employer can discharge its reimbursement obligation in a number of different ways, including through reimbursement for actual expenses or mileage, or through lump sum payments. (*Id.* at pp. 567–571.)

On September 19, 2007, plaintiffs filed their consolidated class action complaint in this matter (Complaint). The Complaint alleges numerous violations of California’s labor laws and Wage Orders, including violations related to missed meal periods, failure to provide mandatory split shift premium pay, and failure to compensate ABM employees for travel expenses incurred when travelling between job sites. The Complaint additionally alleges unfair competition under Business & Professions Code section 17200, based on the asserted labor law violations. Finally, it contains a claim

---

<sup>1</sup> Although the DLSE is responsible for enforcing California’s labor laws, including Wage Orders, its interpretations of Wage Orders—while entitled to consideration and respect—are not binding. (*Aleman v. Airtouch Cellular* (2012) 209 Cal.App.4th 556, 573 (*Aleman*).)

under the Private Attorneys General Act of 2004, Labor Code section 2698 et seq. (PAGA), to collect penalties based on ABM's alleged systemic wrongdoing.

**B. *Class Certification Motion***

After a number of years of discovery and other preliminary matters, plaintiffs filed their motion for class certification on June 14, 2010. The motion sought certification of a general class described as “[a]ll non-exempt janitorial employees and former non-exempt janitorial employees employed by ABM in the State of California at any time from April 6, 2002 to the present” (ABM Workers) (italics omitted). This putative class was estimated as of 2007 to include approximately 35,000 ABM janitorial employees. In addition, the motion proposed seven subclasses of ABM Workers, the following four of which are relevant here: (A) “ABM Workers who . . . suffered an automatic deduction of a half-hour although the employee actually worked through the deducted meal period . . .” (Unpaid Time/Meal Period Subclass); (B) “ABM Workers who were not paid premium meal period wages when they (1) worked shifts of at least five hours without an uninterrupted meal period of at least 30 minutes, (2) worked shifts of at least 10 hours without a second uninterrupted meal period of at least 30 minutes, or (3) were provided a first meal period *after* the fifth hour of work” (Unpaid Meal Premium Subclass); (C) “ABM Workers who were scheduled or required in a workday to work two or more shifts separated by a period of time that was not a bona fide meal period, but were not paid an additional hour of wages for each split shift” (Unpaid Split-Shift Premium Subclass); and (D) “ABM Workers who were not reimbursed for expenses that were necessary to carry out their duties, including (1) the use of their own vehicles to travel between jobsites, or transport ABM supplies or equipment” (Reimbursement Subclass).<sup>2</sup>

Plaintiffs argued that class certification was warranted because, among other reasons, common legal and factual issues predominated. For instance, plaintiffs alleged

---

<sup>2</sup> Plaintiffs declined to appeal from the denial of class certification for their other three proposed subclasses—the Unpaid Rest Premium subclass, the Unpaid Reporting Time subclass, and the Paystub subclass.

that ABM applied a uniform payroll policy which compensated employees according to anticipated work *schedules* rather than for hours actually worked, leading to uncompensated time. In particular, according to plaintiffs, the LMS, ABM's payroll system, automatically deducted 30 minutes of work time for a meal period whenever an employee was scheduled for a shift of five or more hours, without sufficient documentary evidence that those meals were actually taken. In addition, plaintiffs averred that analysis of the LMS disclosed a company policy of never paying statutorily required premium wages for missed meal periods or split shifts, despite the fact that some employees were scheduled to work split shifts and, reportedly, many routinely missed meals if they otherwise had insufficient time for cleaning. Finally, plaintiffs claimed that, although ABM scheduled route workers to provide janitorial services at different locations within the same workday—and required them to travel between sites—the LMS disclosed very few instances in which employees were reimbursed for expenses.

According to plaintiffs, the legality of these common practices could most appropriately be decided on a classwide basis, and ABM's computerized payroll records could be used both to identify violations and to establish common policies. In support of their motion, plaintiffs submitted declarations from 50 ABM Workers, including four named plaintiffs, stating that the schedules under which employees were paid often bore little relationship to the hours actually worked. For instance, they often worked through meal periods because there was too much work to do. In addition, plaintiffs provided evidence of company practices from various ABM supervisors and officials. Finally, plaintiffs also submitted expert declarations from Aaron Woolfson, a provider of database services who analyzed certain timekeeping and payroll data maintained by ABM with respect to its employees. For example, Woolfson determined that, of the 1,141,903 shifts greater than five hours that failed to show any time-out/time-in entries during the scheduled workday, 1,070,517 of those shifts (94 percent) nevertheless showed an automatic 30-minute meal period deduction. Further, there was no indication in the records that premium pay was ever provided for missed meal periods. In addition, although Woolfson identified 6,331 employees for whom ABM reported at least one shift

containing shift segments separated by more than one hour, there was no indication in the payroll records that split shift premium pay was ever provided. Finally, as stated above, analysis of the payroll records disclosed very few instances in which employees were reimbursed for travel expenses (12,834 checks to 826 employees out of the 6,396 employees who worked 155,485 shifts at more than one job site).

ABM opposed plaintiffs' class certification motion, claiming that plaintiffs had failed to offer any "common evidence of a pattern or practice of wrongdoing." Rather, ABM asserted, it promulgated its written meal policy both in its employee handbook and, as of late 2006, on timecards used by some employees.<sup>3</sup> ABM also had a policy for travel reimbursement, and stated that its practice was not to schedule split shifts. With respect to payroll, ABM acknowledges that there is no data in the LMS that describes when a meal period is taken. Rather, the LMS shows the hours scheduled for each employee, by listing the scheduled start and end time for each shift. In addition, the LMS automatically deducts a 30-minute meal period when warranted due to the length of the scheduled shift. According to ABM, when employees have worked their regularly scheduled shifts, they are paid according to their schedule as listed on the LMS. In contrast, if an employee worked additional time, including through a meal break, the site supervisor was required to submit an exception report for input into the payroll system, showing that the employee worked different hours than scheduled.<sup>4</sup> Under these

---

<sup>3</sup> Specifically, the employee handbook stated: "If you are a non-exempt employee . . . you may receive at least one half hour time off as a meal period. Your supervisor schedules meal . . . periods." The timecards, as of late 2006, stated more directly: "State law requires that you take a meal break of at least thirty (30) minutes whenever you work five consecutive hours or more in a day. The meal period must begin before you exceed five hours of work and you must sign in and out for your meal period." According to the plaintiffs, however, timecards that recorded meal breaks were used by less than 15 percent of ABM employees.

<sup>4</sup> According to Woolfson, however, despite ABM's "timesheet maintenance" policy, of the 1,836,083 time entries in the data he reviewed, only 5,625 (0.3 percent) contained any adjustments to pay. Moreover, at least one ABM manager testified that exception reports did not list missed meal breaks and that, in fact, supervisors were not required to report missed meals.

circumstances, ABM argued that class treatment was inappropriate because resolution of plaintiffs' claims would turn on multiple individualized inquiries, such as whether and when each employee took lunch breaks, why an employee failed to take a lunch break, how many miles a particular employee drove between work sites, whether a split shift employee received total wages for that day less than the minimum wage that they would otherwise have been owed, and whether the employee requested a split shift.

In support of its opposition, ABM submitted declarations from 14 current employees as well as excerpts from the depositions of certain of plaintiffs' declarants. According to ABM, the deposition testimony of plaintiffs' declarants cast "serious doubts" on their credibility. With respect to expert testimony, ABM did not provide its own expert, but argued generally that Woolfson's expert declaration should not be considered. ABM also requested that the court take judicial notice of certain deposition testimony provided by Woolfson in another case.

After hearing on April 19, 2011, the trial court issued its oral ruling denying class certification. As a preliminary matter, the court opined that the evidence submitted by Woolfson was inadmissible because his declarations failed to qualify him as an expert on anything material to the class certification motion. Although the court did not strike the Woolfson material, it concluded that it was not admissible "because it doesn't prove anything." When asked about the validity of the many factual findings set forth in the Woolfson declarations, the trial court responded that the question at hand was "whether or not a class should be certified" and that, in this regard, it was "not sufficient to ferret out individualized common questions." With respect to Woolfson himself, the court found many of the statements regarding his expertise conclusory and thus believed that he had not "demonstrated that this court should accept him as a person with particular background, experience, skills, [or] expertise to differentiate him from the rest of the world so he should be accepted by this court as an expert."<sup>5</sup> Since the trial judge rejected

---

<sup>5</sup> Although there was evidence in the record that Woolfson had previously qualified as an expert in both state and federal court, it was attached to an attorney declaration rather than incorporated into Woolfson's own declaration. Under these

Woolfson as an expert, he was not qualified “to present to me opinions that are not generally understood by the rest of the world and to allow him to present hearsay material to rely on and to give me opinions.”

On the merits, the trial court found certification inappropriate due to issues with the subclass definitions. In particular, the court appeared concerned that the subclasses were defined in terms of individuals who had been harmed, making class members unascertainable until the conclusion of the case. In addition, it concluded that the plaintiffs had failed to meet their burden to show that common issues of fact and law predominated over individual questions, “given the employment structure and the variety of circumstances that each worker finds him or her under.” The trial court further noted with regards to predominance that the number of declarations submitted by plaintiffs disclosing labor code violations was insufficient standing on its own to establish commonality. Rather, it believed “evidence besides declarations would have to be submitted to show a common practice.” However, when asked about whether the existence of ABM’s auto-deduct policy for meal periods was evidence showing a common issue sufficient to support certification, the trial court responded: “Your class definition is wrong. It’s not up to me to ferret through what you present and to see if I can craft a class somehow from what you are arguing.” In the end, the trial court opined: “[T]he concept is not whether we can find a common question here. There are plenty of common questions, but the question is whether the common questions predominate over individual questions so that it would be appropriate to utilize the class action mechanism. And it’s just a procedural device for the convenience and efficiency of the court and for the efficiency and economic self-interests of the litigants . . . . [¶] . . . Just because you might have a common question in here somewhere doesn’t mean it’s appropriate to have this case proceed as a class action.”

Plaintiffs filed notices of appeal with respect to this oral ruling in June 2011 (case No. A132387).

---

circumstances, the court found it to be hearsay and indicated, regardless: “I feel it’s my job to figure out whether somebody is an expert.”

**C. *Motion for Relief Under Section 473, Subdivision (b)***

In the meantime, on May 11, 2011, following the oral denial of their class certification motion, plaintiffs filed their 473(b) motion, asking to augment the record with further evidence of Woolfson’s credentials and expertise. Plaintiffs sought introduction of this additional evidence in hopes that the trial court would accept Woolfson as an expert, reassess its ruling that Woolfson’s declarations were hearsay, and reconsider its class certification decision in light of Woolfson’s expert findings and conclusions.<sup>6</sup> In support of their motion, plaintiffs argued that it was excusable neglect not to have made a more thorough demonstration of Woolfson’s qualifications prior to the hearing on the class certification motion because ABM had given no indication that it was raising a serious challenge to those qualifications. Specifically, ABM had failed to lodge a formal objection to the evidence, move to strike the declaration, depose Woolfson on his credentials or conclusions, and/or provide their own contrary expert opinion. Instead, ABM simply made a brief argument in its opposition papers that Woolfson was not qualified to analyze the data in question and that the opinions he offered were conclusory and based on common experience.<sup>7</sup>

The trial court denied plaintiffs’ 473(b) motion after hearing on June 8, 2011. According to the court, plaintiffs had not shown grounds for relief under that statute. In particular, the trial court opined: “Well, the problem with your certification motion was discussed in great detail at the hearing on the motion, and the problem was multifaceted. It covered a full range of matters, none of which falls into the category of a technical

---

<sup>6</sup> Code of Civil Procedure section 473, subdivision (b), provides in relevant part: “The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect.”

<sup>7</sup> This was apparently in contrast to a previous case where counsel for ABM (representing a different party) had vigorously challenged the same Woolfson declaration by submitting written objections, filing rebuttal declarations by defense experts, and extensively cross-examining Woolfson at deposition. According to plaintiffs’ 473(b) motion, these efforts failed and Woolfson was nevertheless qualified as an expert in that case.

failing by the lawyer; in other words, the idea that the problem here is that the lawyers did something wrong and therefore I should relieve the parties from the lawyers' mistake is not what happened here.”

According to the trial court, the real issue in the case was that ABM Workers were not a group of workers that were susceptible to being treated as a class, and thus there were no predominant questions of fact or law. The trial court also reiterated its problems with the plaintiffs' proposed class definitions. In the end, the court indicated that it had reviewed the supplemental evidence provided by plaintiffs and that—even if it agreed to consider it—it would not change the court's view on certification. As the court opined: “Whether or not this witness is qualified to give the opinions, the opinions are not material to this case . . . .” A written order memorializing the trial court's denial of the 473(b) motion was filed on June 29, 2011, and a timely notice of appeal with respect to that order was filed on August 29, 2011 (case No. A133077).

#### **D. *Order Denying Class Certification***

The trial court's written order denying class certification was ultimately filed on September 1, 2011. The court first reiterated its conclusion that the Woolfson declarations submitted by plaintiffs in support of their class certification motion were inadmissible, stating “there is no evidence that Mr. Woolfson is an expert in any area that is material to this case.” As discussed above, the record did contain two orders (from state and federal courts) certifying Woolfson as an expert. The trial court, however, found that the facts set forth in those orders were hearsay and concluded, regardless: “Whether Mr. Woolfson was accepted as an expert in state and federal court is immaterial: the Court does its own work regarding the admissibility of expert testimony.”

With respect to the merits, the trial court first concluded that plaintiffs' class definition was unworkable. It found plaintiffs' general class definition permissible: “All non-exempt janitorial employees and former non-exempt janitorial employees employed by ABM in the State of California at any time from April 6, 2002 to the present.” However, noting that courts have rejected class claims when the class definition is simply

shorthand for persons possibly wronged by the defendant, the trial court found fault with the plaintiffs' seven subclasses, opining that "defining the proposed class(es) by reference to the alleged injury or injuries sustained is a fatal defect, because the members of the class cannot be ascertained until the lawsuit is concluded." According to the trial court, under such circumstances, "it is impossible to identify who is a member of the putative class, which makes it impossible to provide them with notice of the lawsuit, and which therefore also makes it impossible to determine who will be bound by the judgment." The trial court also found fault with the fact that the sum of the seven subclasses did not add up to the entire general class.

In addition to these ascertainability issues, the trial court also concluded that class treatment of plaintiffs' claims was inappropriate because plaintiffs failed to demonstrate that common questions predominate over individual inquiries. In particular, the court found that plaintiffs did not provide sufficient evidence of a common scheme with respect to the negotiation of contracts which, by their terms, led to ABM employees being underpaid. In addition, the court determined that the declarations submitted by plaintiffs regarding claimed labor law violations were insufficient in number, "without additional evidence," to demonstrate a common practice. In sum, the court opined that "consideration of all the factors relevant to class certification demonstrates that individual inquiries will predominate in determining all of the putative class members' claims, and therefore class certification is not a superior method of resolving the instant case."

Following entry of the trial court's written order denying class certification, appellants filed a third notice of appeal (case No. A133695). By order dated January 26, 2012, the three cases were consolidated for all future proceedings in this court. In addition, at the parties' request, we stayed the matter pending issuance by the Supreme Court of its decision in *Brinker, supra*, 53 Cal.4th 1004. Once the Supreme Court's opinion in *Brinker* was final, a briefing schedule was set, and the matter is now before us for decision.

## II. DISCUSSION

### A. *Admissibility of Expert Evidence*

As a preliminary matter, we must address the trial court's decision to disregard the declarations of plaintiffs' expert, Woolfson, in making its class certification determination. As both parties have accurately asserted, we review a trial court's ruling on the admissibility of expert evidence for abuse of discretion. (*Garrett v. Howmedica Osteonics Corp.* (2013) 214 Cal.App.4th 173, 187.) “ ‘However, the discretion to admit or exclude evidence is not unlimited. “The discretion of a trial judge is not a whimsical, uncontrolled power, but a legal discretion, which is subject to the limitations of legal principles governing the subject of its action, and to reversal on appeal where no reasonable basis for the action is shown.” ’ ” (*Kotla v. Regents of University of California* (2004) 115 Cal.App.4th 283, 291–292 (*Kotla*)). This is especially true when, as here, a trial court's exercise of discretion “implicates a party's ability to present its case.” (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 773 (*Sargon Enterprises*); see *Brown v. Colm* (1974) 11 Cal.3d 639, 647 (*Brown*) [“the exclusion of the sole expert relied upon by a party because of an erroneous view of his qualifications is, in a case where expert testimony is essential, an abuse of discretion as a matter of law requiring reversal”].) Indeed, in this context, courts must “be cautious in excluding expert testimony” as the trial court's gatekeeping goal “is simply to exclude ‘clearly invalid and unreliable’ expert opinion.” (*Sargon Enterprises*, at p. 772.)

Should we determine in this case that an abuse of discretion has occurred, that conclusion alone is not sufficient to support reversal of the trial court's certification decision. Rather, the “judgment of the trial court may not be reversed on the basis of the erroneous admission of evidence, unless that error was prejudicial.” (*Grail Semiconductor, Inc. v. Mitsubishi Electric & Electronics USA, Inc.* (2014) 225 Cal.App.4th 786, 799 (*Grail Semiconductor*); see Code Civ. Proc., § 475.) Article VI, section 13, of the California Constitution further provides that “a judgment may not be set aside based on the erroneous admission of evidence ‘unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error

complained of has resulted in a miscarriage of justice.’ ” (*Grail Semiconductor, supra*, 225 Cal.App.4th at p. 799; see Evid. Code, § 353.) “In civil cases, a miscarriage of justice should be declared only when the reviewing court, after an examination of the entire cause, including the evidence, is of the opinion that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.” (*Grail Semiconductor*, at p. 799.) Thus, our task on appeal is to determine whether an abuse of discretion has occurred and, if so, whether it is reasonably probable that a result more favorable to plaintiffs would have been obtained absent the error.

As detailed above, the trial court in the present case based its decision to exclude Woolfson’s expert declarations on two separate grounds—that Woolfson had not properly established himself as an expert and that, regardless, the information that he presented via expert declaration was not material to this case. With respect to Woolfson’s expert qualifications, although the trial court acknowledged in its order denying class certification that Woolfson indicated an expertise “in creating, managing and analyzing large databases,” it rejected him as an expert, finding no evidence that he had “formal training or degrees that would qualify him as an expert to review the timekeeping and payroll data at issue.” The trial court also noted that “Mr. Woolfson’s declaration does not set forth any evidence that he holds certificates, has obtained any kind of college or other professional degree, belongs to any professional organizations, has published any articles, taught or has ever testified as an expert witness at trial.” Further, at the April 2011 hearing denying class certification, the trial court indicated that it believed the qualification information supplied by Woolfson in his expert declaration was too general to establish him as an expert. For example, the trial court stated: “[Woolfson] says he has extensive experience in creating, managing, and analyzing large databases, including, and then he lists a number of things. I have no idea what the term ‘extensive’ means. It looks to me like a conclusion that he hasn’t explained in any way. He doesn’t say how many years, how many assignments, what the nature of the assignments were, what the nature of his tasks were or anything of the like.” Similarly, the trial court noted that “without any detail” Woolfson stated that he “has provided

payroll and timekeeping database analysis for attorneys in numerous wage-hour cases. That does not communicate any specific facts of the type that is usually relied upon to qualify an expert.”

While the better course of action in this case clearly would have been to provide the trial court with a more extensive explanation of the specifics of Woolfson’s expertise, we believe that, under the circumstances, the trial court erred by refusing to qualify Woolfson as an expert in database management and analysis based on the materials before it. “A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, *or* education sufficient to qualify him as an expert on the subject to which his testimony relates.” (Evid. Code, § 720, subd. (a), italics added.) “Expertise, in other words, ‘is relative to the subject,’ and is not subject to rigid classification according to formal education or certification.” (*People v. Ojeda* (1990) 225 Cal.App.3d 404, 408.) Rather, an expert’s qualifications can be established in any number of different ways, including “a showing that the expert has the requisite knowledge of, or was familiar with, or was involved in, a sufficient number of transactions involving the subject matter of the opinion.” (*Howard Entertainment, Inc. v. Kudrow* (2012) 208 Cal.App.4th 1102, 1115 (*Howard Entertainment*)). In sum, with respect to expert qualification, “[t]he determinative issue in each case must be whether the witness has sufficient skill or experience in the field so that his testimony would be likely to assist the jury in the search for the truth, and no hard and fast rule can be laid down which would be applicable in every circumstance.” (*Brown, supra*, 11 Cal.3d at p. 645; see *Howard Entertainment*, at p. 1115.)

Once this threshold has been met, questions regarding *the degree* of an expert’s knowledge go more to the weight of the evidence presented than to its admissibility. (See *People v. Tuggle* (2012) 203 Cal.App.4th 1071, 1079–1080; see also *Jordan v. Allstate Insurance Co.* (2004) 116 Cal.App.4th 1206, 1217 [where expert declaration was sufficient to demonstrate “ ‘special’ ” knowledge of the subject matter, the “weight and value” of the expert opinion was a matter for the trier of fact].) Finally, the ability of an expert witness to testify as to either facts or opinions is limited to matters that are not

common knowledge. Thus, for example, “[e]xpert testimony as to facts may be necessary where the facts from which conclusions are to be drawn are peculiarly within the expert’s knowledge and are not a matter of common knowledge as to which an ordinary witness may competently testify.” (1 Witkin, Cal. Evid. (5th ed. 2012) Opinion Evidence, § 27, p. 638.) Similarly, expert opinion should be excluded “ ‘ “when ‘the subject of inquiry is one of such common knowledge that men of ordinary education could reach a conclusion as intelligently as the witness.’ ” ’ ” (Kotla, *supra*, 115 Cal.App.4th at p. 291; see Evid. Code, § 801, subd. (a).)

Here, Woolfson provided a declaration indicating that he was a founder of TelSwitch, Inc., a company which “builds and develops telephonic database service for several major telecommunications companies to manage their billing, as well as calculating and maintaining extensive databases related to the accurate calculation of the rates and rounding mechanisms used on telecommunications services.” Woolfson further declared that he was a managing partner of Merkt-Woolfson, a company which “produces billing and database mechanisms for banks to keep track of the paperwork that banks require to maintain mortgage and loan origination” and also provides “extensive database management services to both government and private industries,” including “the largest banks, military contractors, and publicly held telecommunications carriers where accuracy and accountability are a necessity.” Moreover, according to Woolfson, a “typical transaction load” for an “average database” maintained by his company was approximately one million records a day; he was “accustomed to, and comfortable with, working with a large amount of data across a variety of industries, including for litigation purposes”; and he had “extensive experience in creating, managing, and analyzing large databases,” including specifically timekeeping databases.

Woolfson’s expert declaration additionally indicated that he had provided “payroll and timekeeping database analysis for attorneys in Northern and Southern California involving numerous wage and hour class action cases.” He then described the timekeeping records he had received from ABM—including, for example, “1,836,083 Time Entries in Microsoft Excel™ files covering 27,183 employees who performed

1,500,175 shifts of work at 5380 Job Site locations from 12-08-02 through 07-18-07”— and walked through his step-by-step analysis of those records. Indeed, Woolfson went so far as to set forth the specific Structured Query Language (SQL) queries he used to extract relevant information from ABM’s records.<sup>8</sup>

We reiterate that additional information regarding the specifics of Woolfson’s expertise in matters relevant to this case would clearly have been preferable.<sup>9</sup> However,

---

<sup>8</sup> As stated above, in addition to Woolfson’s expert declarations, the plaintiffs submitted an attorney declaration that, among other things, attached two court orders from cases in which Woolfson had reportedly been qualified as an expert under similar circumstances. (See *Avalos v. La Salsa, Inc.* (Super. Ct. Santa Barbara County, 2010, JCCP No. 4488 (*Avalos*) [order dated May 17, 2010, granting in part and denying in part plaintiff’s motion for class certification]; see also *Hines v. KFC U.S. Properties, Inc.* (S.D. Cal., Oct. 22, 2010, No. 09-cv-02422-JM (POR) (*Hines*) [order granting in part and denying in part motion for class certification, which states at page 6 that “Mr. Woolfson is an expert in the compilation and analysis of databases, based upon his declaration which sets forth his qualifications and the methods and procedures adopted to analyze the data.”].) At the April 2011 hearing on class certification, the trial court initially indicated that it believed there was evidence in the record that Woolfson had *not* previously qualified as an expert. When plaintiffs’ counsel mentioned the two cases cited above as instances where Woolfson had been qualified, the court opined that the referenced court orders were hearsay and that, regardless, it chose not to take judicial notice of them because it believed it was the court’s job “to figure out whether somebody is an expert.” The court’s written order denying class certification reiterated this sentiment, stating that whether Woolfson was “accepted as an expert in state and federal court is immaterial; the Court does its own work regarding the admissibility of expert testimony.” We agree with both the trial court and ABM that one court is not *required* to adopt another court’s conclusion that an individual is an expert in a particular matter, although it may do so. (See *Mora v. Big Lots Stores, Inc.* (2011) 194 Cal.App.4th 496, 513–514.) However, that a proposed expert has been previously qualified seems, at the very least, relevant to another court’s subsequent qualification analysis and we question the trial court’s perhaps overly technical application of the hearsay rule when establishing prior expert qualification via judicially noticed court order. Nevertheless, we need not finally reach the issue, as we would find error here regardless of whether Woolfson’s history as a qualified expert is considered.

<sup>9</sup> For instance, in a supplemental declaration filed in connection with plaintiffs’ 473(b) motion, Woolfson clarified that he had *over 24 years* of experience developing highly accurate database applications for companies such as Japan Telecom America, Experian, Bank of America, and JP Morgan Chase; that his database techniques were

we conclude that the materials submitted in advance of the April 2011 hearing on class certification in this case were sufficient to qualify Woolfson as an expert in database management and analysis, and that the trial court's conclusion to the contrary was an abuse of discretion. In particular, we find that the trial court's emphasis on formal education and membership in professional organizations was misplaced with respect to Woolfson's stated expertise, given his clear familiarity with numerous, highly complex transactions in that subject matter. (See *Howard Entertainment, supra*, 208 Cal.App.4th at p. 1115.) Indeed, while admittedly not detailed, Woolfson's declaration did indicate that he had "extensive experience" in database management and analysis, including statements that he held leadership positions in two database companies which serviced the "largest banks, military contractors, and publicly held telecommunications carriers"; that his company handled typical transaction loads of approximately one million records per day on "average" databases it maintained; and that he had previously provided payroll and timekeeping database analysis in numerous wage and hour class action cases in California. Moreover, although ABM did argue briefly before the trial court that Woolfson was not qualified to analyze the data at issue and that certain of his conclusions were overly broad and lacked sufficient factual foundation, ABM did not challenge the veracity of any of Woolfson's qualifications as set forth in his declaration, nor did it contest *even a single one* of the myriad factual findings made by Woolfson during the course of his analysis.

---

used by the federal government, including by the Department of Justice and the Patriot Missile Defense Training System; that he had a number of relevant professional certifications; that his authored works included an analysis of the merger between Continental Airlines and United Airlines that was presented to the Senate Judiciary Committee in 2010; that he had qualified as an expert in *Avalos* and *Hines*, both wage and hour class actions in which the courts relied on his analysis in granting class certification; and that he had been retained as an expert in over 40 cases (90 percent class actions) by both plaintiffs and defendants to analyze "timekeeping, payroll records, telephone call records, credit card records, reimbursement records, and travel records (e.g., gps data and locations where employees worked)."

Under these circumstances, plaintiffs’ evidence supporting Woolfson’s expert qualifications showed that he had “sufficient skill or experience” in the field of database management and analysis such that his declarations should have been considered by the trial court. (See *Brown, supra*, 11 Cal.3d at p. 645.) Nevertheless, the trial court chose to reject all of the information provided by Woolfson, despite the fact that, as we discuss further below, Woolfson’s analysis of the ABM database was central to plaintiffs’ class certification motion, and thus the trial court’s decision effectively foreclosed plaintiffs’ ability to put on their case. (See *Sargon Enterprises, supra*, 55 Cal.4th at p. 773; *Brown, supra*, 11 Cal.3d at p. 647.) This was error.

While we do not here pass on the admissibility of *every* opinion reached by Woolfson based on his manipulation of ABM’s database, we find the many facts generated by Woolfson’s analysis clearly admissible as matters beyond the common knowledge or experience of an ordinary witness.<sup>10</sup> (See *Business Objects, S.A. v. MicroStrategy, Inc.* (Fed. Cir. 2005) 393 F.3d 1366, 1368 [noting that SQL requires the user to “understand the structure and content of the relational database as well as the complex syntax of the specific query language” and that “[t]hese complexities generally prevent laypersons from drafting queries in query languages.”].) Moreover, as evidence of ABM’s common wage and timekeeping practices, Woolfson’s results would unquestionably aid a jury in its search for the truth regarding any alleged classwide wage or hour violations in this case. (See *Brown, supra*, 11 Cal.3d at p. 645; *Howard Entertainment, supra*, 208 Cal.App.4th at p. 1115; see also *Brinker, supra*, 53 Cal.4th at p. 1033 [“Claims alleging that a uniform policy consistently applied to a group of employees is in violation of the wage and hour laws are of the sort routinely, and properly, found suitable for class treatment.”].)

---

<sup>10</sup> As just one example, Woolfson identified ABM workers scheduled to work shift segments separated by more than one hour on the same day, without any indication of premium pay, through use of the following SQL queries: “1. *select count (\*) from workdata where SplitShiftViolation = ‘YES’ and isWork = ‘YES’* [¶] 2. *select distinct reference from workdata where SplitShiftViolation = ‘YES’ and iswork = ‘YES’.*”

Frankly, we are somewhat mystified by the trial court’s wholesale exclusion of the entirety of Woolfson’s evidence in this matter. Upon review, it appears that the trial court’s conclusions regarding the admissibility of the Woolfson materials were impermissibly tainted by its strong views with respect to the underlying merits of plaintiffs’ class certification motion—that is, that class certification was improper due to the individualized inquiries that would be required to establish which ABM employees, if any, had been harmed in this matter. This determination, moreover, appears to have been based, at least in part, on the mistaken notion that database analysis of timekeeping and payroll records cannot be used as a means to show common practices for purposes of class certification. Indeed, at the June 2011 hearing on plaintiffs’ 473(b) motion, through which plaintiffs were attempting to bolster Woolfson’s expert credentials, the trial court opined that ABM workers were “not susceptible to be treated as a class, period” and that the “basic problem” in the case was that “individualized analysis of working situations” would be needed “to understand why a worker may not have been given a lunch break.” Thus, in the opinion of the trial court: “*Whether or not this witness is qualified to give the opinions, the opinions are not material to this case.*” (Italics added.)

In sum, it was error for the trial court to completely disregard plaintiffs’ proffered expert evidence of common practice, rather than accepting it for what it was and weighing it against the existence of any individualized inquiries that might properly have defeated plaintiffs’ request for class certification. Moreover, as we discuss in detail below, the trial court’s decision clearly prejudiced plaintiffs, as it left them without any evidence of systemic wrongdoing other than the information contained in the declarations and deposition testimony submitted in connection with their class certification motion, materials which the trial court found insufficient in number to demonstrate predominant common questions. Indeed, the trial court expressly stated: “The number of declarations [submitted by plaintiffs] compared to the number of employees by itself would not be sufficient [to demonstrate predominance]. . . . What I’m suggesting is that *evidence besides declarations would have to be submitted to show a common practice.*” (Italics added.) Yet this was precisely the evidence that the trial court excluded. Since we find it

reasonably probable that a result more favorable to the plaintiffs would have been reached in the absence of this error, the trial court's order denying class certification cannot stand. (See *Kotla, supra*, 115 Cal.App.4th at p. 294.)<sup>11</sup>

**B. Class Certification Issues**

1. *Rules Governing Class Actions and Standard of Review*

The requirements for class certification are well established and were recently summarized by our high court in *Brinker, supra*, 53 Cal.4th 1004, 1021: “Originally creatures of equity, class actions have been statutorily embraced by the Legislature whenever ‘the question [in a case] is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court . . . .’ [Citations.] Drawing on the language of Code of Civil Procedure section 382 and federal precedent, we have articulated clear requirements for the certification of a class. The party advocating class treatment must demonstrate the existence of an ascertainable and sufficiently numerous class, a well-defined community of interest, and substantial benefits from certification that render proceeding as a class superior to the alternatives. [Citations.] ‘In turn, the “community of interest requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class.” ’ ”

“ ‘[T]his state has a public policy which encourages the use of the class action device.’ ” (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 340 (*Sav-On*)). Further, whether class certification should be granted is a procedural question, and not a question of whether the action is “ ‘legally or factually meritorious.’ ” (*Id.* at p. 326.) As a general matter, “ ‘a class action is not inappropriate simply because

---

<sup>11</sup> Because we conclude that the trial court erred in failing to consider Woolfson's expert declarations when making its class certification determination at the hearing in April 2011 (as memorialized by the court's order denying plaintiffs' motion for class certification filed on September 1, 2011), we need not reach the issue of whether the trial court also erred in refusing to grant plaintiffs' 473(b) motion so that additional evidence of Woolfson's expert qualifications could be brought before the court.

each member of the class may at some point be required to make an individual showing as to his or her eligibility for recovery or as to the amount of his or her damages.’ ” (*Id.* at p. 333.)

In addition, with respect to the superiority of the class action mechanism—and as is pertinent to our present inquiry—we have previously noted that “[c]ourts regularly certify class actions to resolve wage and hour claims. [Citations.] In this arena the class action mechanism allows claims of many individuals to be resolved at the same time, eliminates the possibility of repetitious litigation and affords small claimants with a method of obtaining redress for claims which otherwise would be too insignificant to warrant individual litigation. [Citation.] Moreover, the issues slated for contest are primarily common issues involving common evidence. It would not be efficient or fair to relegate these complaints to multiple trials.” (*Bufile v. Dollar Financial Group, Inc.* (2008) 162 Cal.App.4th 1193, 1208 (*Bufile*); see *Brinker, supra*, 53 Cal.4th at p. 1033.)

Indeed, as our high court elaborated in *Brinker*, a theory of liability that an employer “has a uniform policy, and that that policy, measured against wage order requirements, allegedly violates the law—is by its nature a common question eminently suited for class treatment.” (*Brinker, supra*, 53 Cal.4th at p. 1033.) “[I]n the general case to prematurely resolve such disputes, conclude a uniform policy complies with the law, and thereafter reject class certification . . . places defendants in jeopardy of multiple class actions, with one after another dismissed until one trial court concludes there *is* some basis for liability and in that case approves class certification. [Citation.] It is far better from a fairness perspective to determine class certification independent of threshold questions disposing of the merits, and thus permit defendants who prevail on those merits, equally with those who lose on the merits, to obtain the preclusive benefits of such victories against an entire class and not just a named plaintiff.” (*Id.* at p. 1034.)

“California courts consider ‘pattern and practice evidence, statistical evidence, sampling evidence, expert testimony, and other indicators of a defendant’s centralized practices in order to evaluate whether common behavior towards similarly situated plaintiffs makes class certification appropriate.’ ” (*Jaimez v. Daihatsu USA, Inc.* (2010)

181 Cal.App.4th 1286, 1298 (*Jaimez*.) Other relevant factors include “ ‘whether the class approach would actually serve to deter and redress alleged wrongdoing.’ ” (*Ibid.*) Moreover, in the wage and hour context, “[w]e have recognized that retaining one’s employment while bringing formal legal action against one’s employer is not ‘a viable option for many employees,’ ” and thus a class action may be appropriate as “a current employee who individually sues his or her employer is at greater risk of retaliation.” (*Gentry v. Superior Court* (2007) 42 Cal.4th 443, 459, abrogated on other grounds as stated in *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 359–360; see also *Williams v. Superior Court* (2017) 3 Cal.5th 531, 558, citing *Gentry*.) And, in *Gentry* our high court noted that class actions may be particularly useful for immigrant workers with limited English language skills, as illegal employer conduct might otherwise escape their attention. (*Gentry*, at p. 461.)

A ruling on class certification is reviewed for abuse of discretion. (*Brinker, supra*, 53 Cal.4th at p. 1022; *Sav-On, supra*, 34 Cal.4th at p. 326.) Under this standard, “ ‘[a] certification order generally will not be disturbed unless (1) it is unsupported by substantial evidence, (2) it rests on improper criteria, or (3) it rests on erroneous legal assumptions.’ ” (*Brinker, supra*, 53 Cal.4th at p. 1022; see *Bufile, supra*, 162 Cal.App.4th at p. 1204 [noting that while “[t]rial courts enjoy wide discretion with regard to class certification,” we will nevertheless reverse and order denying class certification “if the order is based on improper criteria or incorrect assumptions”].) Moreover, “[a]n appeal from an order denying class certification presents an exception to customary appellate practice by which we review only the trial court’s ruling, not its rationale. If the trial court failed to conduct the correct legal analysis in deciding not to certify a class action, ‘ ‘an appellate court is required to reverse an order denying class certification . . . , ‘even though there may be substantial evidence to support the court’s order.’ ” ’ [Citation.] In short, we must ‘ ‘consider only the reasons cited by the trial court for the denial, and ignore other reasons that might support denial.’ ” ’ ” (*Alberts, supra*, 241 Cal.App.4th at p. 399.)

On the issue of predominance, a trial court’s finding is generally reviewed for substantial evidence. (*Brinker, supra*, 53 Cal.4th at p. 1022.) Thus, “[w]e must ‘[p]resum[e] in favor of the certification order . . . the existence of every fact the trial court could reasonably deduce from the record . . . .’ ” (*Ibid.*) However, since the focus of this type of certification dispute “is on what type of questions—common or individual—are likely to arise in the action, rather than on the merits of the case [citations], in determining whether there is substantial evidence to support a trial court’s certification order, we consider whether the *theory of recovery* advanced by the proponents of certification is, as an analytical matter, likely to prove amenable to class treatment. [Citations.] ‘Reviewing courts consistently look to the allegations of the complaint and the declarations of attorneys representing the plaintiff class to resolve this question.’ ” (*Sav-On, supra*, 34 Cal.4th at p. 327, italics added.)

In the instant case, plaintiffs contend that the trial court abused its discretion, both in concluding that their proposed subclasses are not ascertainable and in determining that common issues do not predominate over individual inquiries. We consider each claim in turn.

## 2. *Ascertainability*

As stated above, the trial court refused to certify this matter as a class action because, among other reasons, it believed the subclasses proposed by appellants were not ascertainable. In particular, the trial court opined that defining the proposed subclasses by reference to the alleged Labor Code violations sustained was a “fatal defect,” because the putative subclass members could not be identified without a determination on the merits of each class member’s case. The court reasoned that, when the “class definition is simply shorthand for persons possibly wronged by the defendant,” it is impossible to identify putative class members until the lawsuit is concluded, making it impossible both to provide appropriate notice and to determine who will be bound by the judgment. The trial court also found fault with the fact that the sum of the seven subclasses did not add up to the entire general class of non-exempt janitorial employees, because some members of the general class may not have suffered any harm. Unsurprisingly, ABM agrees with

the trial court on appeal, arguing that “the only means by which the many subclasses could be ascertained was by a trial on the merits, requiring the testimony of each and every putative class member on each and every claim, a concept that is antithetical to the very concept of class litigation.” In our opinion, however, both the trial court and ABM have fundamentally misapprehended the concept of ascertainability as it applies to the circumstances of this case.

“Ascertainability is achieved ‘by defining the class in terms of objective characteristics and common transactional facts making the ultimate identification of class members possible when that identification becomes necessary.’” (*Bomersheim v. Los Angeles Gay & Lesbian Center* (2010) 184 Cal.App.4th 1471, 1483; see *Nicodemus v. Saint Francis Memorial Hospital* (2016) 3 Cal.App.5th 1200, 1212 (*Nicodemus*); *Aguirre v. Amscan Holdings, Inc.* (2015) 234 Cal.App.4th 1290, 1300 (*Aguirre*)). “In determining whether a class is ascertainable, the trial court examines the class definition, the size of the class and *the means of identifying class members.*” (*Bufile*, *supra*, 162 Cal.App.4th at p. 1207, italics added.) Thus, a plaintiff is not required to establish the identity of class members at the class certification stage of the proceedings. (*Reyes v. Board of Supervisors* (1987) 196 Cal.App.3d 1263, 1274.)

Moreover, “[w]hile often it is said that ‘[c]lass members are “ascertainable” where they may be readily identified without unreasonable expense or time by reference to official records’ [citations], that statement must be considered in light of the purpose of the ascertainability requirement.” (*Medraza v. Honda of North Hollywood* (2008) 166 Cal.App.4th 89, 101 (*Medraza*)). “ ‘Ascertainability is required in order to give notice to putative class members as to whom the judgment in the action will be res judicata.’ ” (*Aguirre, supra*, 234 Cal.App.4th at p. 1300.) Therefore, “[t]he goal in defining an ascertainable class ‘is to use terminology that will convey “sufficient meaning to enable persons hearing it to determine whether they are members of the class plaintiffs wish to represent.” [Citation.] “ . . . Otherwise, it is not possible to give adequate notice to class members or to determine after the litigation has concluded who is barred from relitigating.” ’ ” (*Id.* at pp. 1300–1301; see also *Medraza*, at p. 101

[ascertainability requirement is satisfied if “the potential class members may be identified without unreasonable expense or time and given notice of the litigation, and the proposed class definition offers an objective means of identifying those persons who will be bound by the results of the litigation”].)

In sum, a class is ascertainable if a plaintiff supplies a reasonable means of identifying potential class members and the class is defined in terms of objective characteristics and common transactional facts sufficient to allow a class member to identify himself or herself as having a right to recover based on that description. So long as these requirements are met, a class is ascertainable “even if the definition pleads ultimate facts or conclusions of law.” (*Hicks v. Kaufman and Broad Home Corp.* (2001) 89 Cal.App.4th 908, 915–916 (*Hicks*); see *Faulkinbury v. Boyd & Associates, Inc.* (2013) 216 Cal.App.4th 220, 226, 240–241 (*Faulkinbury*) [directing certification of subclasses based on meal break, rest break, and overtime violations]; *Jaimez, supra*, 181 Cal.App.4th at pp. 1291–1292, 1295–1296 [directing certification of classes found ascertainable by the trial court, including a meal break class “based upon the failure to permit or authorize meal breaks and the failure to pay one hour of wages for each meal break violation” and an overtime class “based upon the failure to pay overtime to the class”]; *Ghazaryan v. Diva Limousine, Ltd.* (2008) 169 Cal.App.4th 1524, 1529, 1539 [directing certification of two subclasses based on failure to pay earned wages and overtime and failure to provide mandatory rest breaks].) Under this established analytical framework—and when one considers the data supplied by Woolfson—the trial court’s conclusion that the proposed subclasses in this case are unascertainable due to the need for individualized merit determinations is simply not defensible.

Indeed, we recently considered and rejected a similar argument in *Nicodemus, supra*, 3 Cal.App.5th 1200. In that case, the plaintiff filed an action alleging that she was overcharged for copies of her patient medical records, which were sought in anticipation of litigation by her attorney pursuant to Evidence Code section 1158. The named defendants were the plaintiff’s hospital (Saint Francis) and HealthPort Technologies, LLC (HealthPort), a company that, during the relevant timeframe, provided Saint Francis

with patient medical record release of information services pursuant to a contract. (*Nicodemus*, at pp. 1205, 1207.) The plaintiff moved for certification of a class comprised of all patients who requested medical records from a California medical provider through an attorney prior to litigation and who were charged by HealthPort more than the statutory maximum set forth in Evidence Code section 1158. (*Id.* at pp. 1205–1206, 1208.) The trial court concluded that the plaintiff’s proposed class was unascertainable. (*Id.* at p. 1210.) Although HealthPort tracked all attorney requests using a separate billing code in its database, the trial court concluded that the data set was over-inclusive because the plaintiff “had not presented a mechanism for determining whether attorneys’ requests were submitted ‘prior to litigation’ . . . without individualized inquiry, for example, by asking’ each attorney.” (*Ibid.*)

On appeal, we concluded that the trial court erred as a matter of law in finding that the proposed class was not ascertainable. (*Nicodemus, supra*, 3 Cal.App.5th at pp. 1213–1217.) Because it is highly relevant to the case at hand, we set out our reasoning in some detail: “[E]ven assuming the attorney request data set does include some unknown number of requests that were submitted after litigation was commenced (or after defendants’ first appearance) or for reasons unrelated to litigation, this fact would not defeat ascertainability. HealthPort argued, and the trial court concluded, that a class is not ascertainable if the class members who are entitled to recover from the defendants cannot be identified without an individualized inquiry. That is not, however, the standard for determining whether a class is *ascertainable*. As noted, ‘[a]scertainability is required in order to give notice to putative class members as to whom the judgment in the action will be res judicata. [Citations.] . . . As long as the potential class members may be identified without unreasonable expense or time and given notice of the litigation, and the proposed class definition offers an objective means of identifying those persons who will be bound by the results of the litigation, the ascertainability requirement is met.’ (*Medrazo, supra*, 166 Cal.App.4th at p. 101.) Plaintiff here has identified the class in terms of objective characteristics, tracking the provisions of section 1158; if it is determined later in the litigation that the ‘07’ data set includes requests not made

pursuant to section 1158, ‘those [persons] can be eliminated from the class at that time.’ (*Aguiar v. Cintas Corp. No. 2, supra*, 144 Cal.App.4th at p. 136 (*Aguiar*); see also *Sav-On, supra*, 34 Cal.4th at p. 333 [‘ “a class action is not inappropriate simply because each member of the class may at some point be required to make an individual showing as to his or her eligibility for recovery” ’]; *Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715, 743 [class of all employees in certain job categories ascertainable even though some employees may not have worked overtime and thus may not be entitled to any recovery].) Nor should a court ‘decline to certify a class simply because it is afraid that insurmountable problems may later appear at the remedy stage.’ ” (*Nicodemus, supra*, 3 Cal.App.5th at p. 1214.) Thus, contrary to the trial court’s belief, possible over-inclusiveness in the method proposed for identifying potential class members does not defeat ascertainability.

In reaching our conclusion in *Nicodemus*, we distinguished *Hale v. Sharp Healthcare* (2014) 232 Cal.App.4th 50 (*Hale*)—a case relied on by ABM here—in which a class was decertified after nearly three years of litigation, discovery, and notice to potential class members. (*Id.* at pp. 53–55; see *Nicodemus, supra*, 3 Cal.App.5th at pp. 1215–1216.) *Hale* involved an allegation that a class of persons who self-paid for emergency room treatment were overcharged when compared to insured persons. (*Hale*, at p. 53.) In moving to decertify, the defendant argued that the class was not ascertainable because the defendant did not keep records in such a way “as to reasonably and readily identify those included in the class definition without individualized inquiries.” (*Id.* at p. 55.) The trial court agreed with the defendant and the appellate court affirmed, opining with respect to ascertainability that “[i]t is the inability to reasonably distinguish those individuals [later determined to qualify for coverage] from individuals who were actually uninsured and then to identify any disparity in amounts paid that make it unreasonable to ascertain the defined class.” (*Ibid.*) In *Nicodemus*, we distinguished *Hale*, both because of its “distinctive procedural posture” and because, under *Hale*’s facts, “it was indisputably demonstrated that there was simply no way to

avoid a complicated individualized inquiry to determine not just eligibility for damages but *to prove liability*.” (*Nicodemus, supra*, 3 Cal.App.5th at p. 1216, italics added.)

In contrast, we found *Bufile, supra*, 162 Cal.App.4th 1193, instructive. In *Bufile*, which involved meal and rest break claims, “[t]he proposed class was defined as employees for whom the defendant’s records showed a meal period not taken because the employee was the only person in the store or was the only person present except for a trainee.” (*Nicodemus, supra*, 3 Cal.App.5th at p. 1216.) “Although employees who missed a meal period could be identified from the defendant’s records, employees who missed a rest period could not.” (*Ibid.*) However, *Bufile* submitted evidence that the defendant had a policy that hourly employees who were working alone or only with a trainee were not allowed to go off duty for any type of break, and argued that the records identifying class members who missed meal periods for the reasons specified thus also identified those who missed rest breaks. (*Bufile*, at pp. 1206, 1208.) Under these circumstances, the appellate court reversed the trial court’s denial of class certification, concluding that “the class was ascertainable from the defendant’s records.” (*Nicodemus*, at p. 1216.) “In doing so, the court rejected the defendant’s ‘speculation’ that an employee who missed a meal break nonetheless might have received a rest break, observing ‘speculation that goes to the merits of ultimate recovery [was] an inappropriate focus for the ascertainability inquiry.’ (*Ibid.*, citing *Medraza, supra*, 166 Cal.App.4th at p. 101 [defendant’s sales records offered an objective means of identifying potential class members, and plaintiff’s inability at the class certification stage to identify precisely which buyers qualified as class members was “irrelevant”] and *Harper v. 24 Hour Fitness, Inc.* (2008) 167 Cal.App.4th 966, 976 [“the need to individually examine each member’s contract to ultimately determine whether he or she qualifies for inclusion in the class does not . . . demonstrate a lack of ascertainability or manageability”].)

Adopting this analysis in *Nicodemus*, we concluded that potential class members could be readily identified by reference to HealthPort’s attorney request data set, and the “speculation” that the data set might be over-inclusive went “to the merits of each class member’s recovery” and thus “was an inappropriate focus of the ascertainability inquiry.”

(*Nicodemus, supra*, 3 Cal.App.5th at p. 1216.) Our analysis of ascertainability in the present case mirrors our conclusions in *Nicodemus*. Here, as established by Woolfson, the potential subclass members are all readily identifiable by reference to ABM’s own employment and payroll records.

For instance, the subclass of ABM Workers who “suffered an automatic deduction of a half-hour although the employee actually worked through the deducted meal period” can be identified through ABM’s timekeeping and payroll records showing numerous instances where a meal deduction was made for a shift without any corresponding time entry indicating that a meal period was taken. The subclass of ABM Workers who were not paid premium meal period wages when they worked shifts of a particular length without a recorded meal period can similarly be ascertained through reference to the same records, reviewed to determine whether any required premium wages were paid where no meal period was recorded. The Unpaid Split-Shift Premium Subclass— “ABM Workers who were scheduled or required in a workday to work two or more shifts separated by a period of time that was not a bona fide meal but were not paid an additional hour of wages for each split shift”—can be identified by examining ABM’s timekeeping and payroll records to determine which employees worked two or more shifts in the same day separated by more than an hour, but were not paid premium wages related to the split shift(s).<sup>12</sup> Finally, members of the Reimbursement Subclass—ABM Workers who were not reimbursed for expenses related to the use of their own vehicles for travel between jobsites—can be identified by searching ABM payroll records to determine which employees worked at multiple jobsites separated by a certain baseline number of miles during the same workday, but did not receive reimbursement for travel.<sup>13</sup>

---

<sup>12</sup> As discussed above, the DLSE has historically taken the position that a bona fide meal period is one that does not exceed one hour in length. (See *ante* at p. 4 & fn. 1.)

<sup>13</sup> Woolfson opined below that the ABM databases contained location information for each worker’s shift and that from this information, along with the addresses of the

In addition, the subclasses are all defined using objective characteristics and common transactional facts sufficient to allow a potential class member to identify himself or herself as having a right to recover pursuant to that subclass. For example, the nonexempt ABM workers who would receive notice as part of the general class would all be aware whether they worked through meal periods, failed to receive reimbursement for their travel expenses between worksites, or otherwise fell within the articulated subclasses. Under these circumstances, ABM’s speculation that some potential class members identified in the data may ultimately not be entitled to relief—because, perhaps, they actually took an otherwise unrecorded meal, or were not entitled to a split shift premium on a particular day, or did not drive themselves between job sites—goes to the merits of each class member’s recovery and, as such, was an inappropriate focus of the trial court’s ascertainability inquiry. (See *Sav-On, supra*, 34 Cal.4th at p. 338 [class can be certified based on partial commonality, meaning not every single member of the proposed class needs to be exposed to the wrongful practice nor does the practice have to be unlawful or lawful as to every class member].)<sup>14</sup>

### 3. *Predominance.*

Having determined that the plaintiffs have proposed ascertainable classes, we must next address the trial court’s conclusion that class certification was inappropriate in this matter because individual inquiries predominate over common questions. As mentioned above, “[t]he ‘ultimate question’ the element of predominance presents is whether ‘the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would

---

work locations, it would be possible to calculate the mileage each worker traveled each day.

<sup>14</sup> In this regard, we note additionally that “if necessary to preserve the case as a class action, the court itself can and should redefine the class where the evidence before it shows such a redefined class would be ascertainable.” (*Hicks, supra*, 89 Cal.App.4th at p. 916.) Thus, as this action progresses, the trial court should be open to making modifications to the class definitions as necessary to avert developing certification problems or to otherwise enhance the efficiencies of the class certification model.

be advantageous to the judicial process and to the litigants.’ [Citations.] The answer hinges on ‘whether the theory of recovery advanced by the proponents of certification is, as an analytical matter, likely to prove amenable to class treatment.’ [Citation.] A court must examine the allegations of the complaint and supporting declarations [citation] and consider whether the legal and factual issues they present are such that their resolution in a single class proceeding would be both desirable and feasible. ‘As a general rule if the defendant’s liability can be determined by facts common to all members of the class, a class will be certified even if the members must individually prove their damages.’ ” (*Brinker, supra*, 53 Cal.4th at pp. 1021–1022, fn. omitted.) Indeed, “at the class certification stage, as long as the plaintiff’s posited theory of liability is amenable to resolution on a classwide basis, the court should certify the action for class treatment even if the plaintiff’s theory is ultimately incorrect at its substantive level, because such an approach relieves the defendant of the jeopardy of serial class actions and, once the defendant demonstrates the posited theory is substantively flawed, the defendant ‘obtain[s] the preclusive benefits of such victories against an entire class and not just a named plaintiff.’ ” (*Hall v. Rite Aid Corp.* (2014) 226 Cal.App.4th 278, 293–294, italics omitted.)

In short, when analyzing the element of predominance for purposes of class certification “the focus must be on the policy the plaintiffs are challenging and whether the legality of that policy can be resolved on a classwide basis.” (*Lubin v. The Wackenhut Corp.* (2016) 5 Cal.App.5th 926, 940.) Thus, for example, in *Morgan v. Wet Seal, Inc.* (2012) 210 Cal.App.4th 1341, the Court of Appeal affirmed the trial court’s denial of class certification in a case alleging that the company required employees to purchase company clothing to wear to work but failed to reimburse such purchases. Because there were no clear companywide policies requiring employees to purchase company clothing as a condition of employment or describing what an employee was required to wear, the trial court determined there was no common method to prove the *fact of liability* on a classwide basis. Rather, individualized inquiries would need to be made regarding, among other things, what employees were told by store managers about

wardrobe, how employees interpreted any such discussion, and what each store manager actually required employees to purchase. (*Id.* at pp. 1356–1357.)

In contrast, numerous other cases have held that individualized issues regarding *proof of the amount of damages* class members may recover does not defeat a class action so long as there are *common questions of liability* amenable to class resolution. (See, e.g., *Faulkinbury*, *supra*, 216 Cal.App.4th 220, 232–240 [common issues of fact predominated for subclasses related to meal, rest, and overtime violations because liability could be determined classwide based on uniform policies, or lack thereof; individual issues, such as whether individuals took rest breaks, went to the issue of damages and did not preclude class certification]; *Jones v. Farmers Ins. Exchange* (2013) 221 Cal.App.4th 986, 997 [a uniform policy denying compensation for preshift work presented predominantly common issues of fact and law because liability depended on the existence of the uniform policy, rather than individual damages determinations]; *Benton v. Telecom Network Specialists, Inc.* (2013) 220 Cal.App.4th 701, 726 [theory that defendant violated wage and hour requirements by failing to adopt meal and rest break policies is amenable to class treatment; whether employee was able to take required breaks goes to damages].)

The common theme in these cases is that the plaintiff’s theory of liability could be determined based on common uniform policies applicable to the class as a whole. (See also *Department of Fish & Game v. Superior Court* (2011) 197 Cal.App.4th 1323, 1356 [“Class treatment is not barred where a single wrongful act has different effects on different claimants such that some may have claims while others may not. ‘ “In such cases, the Courts will generally certify a class if the defendant’s action can be found to be wrong in the abstract even if no individual person has been damaged. [Citations.] These situations are distinguishable from situations where the Court cannot determine the wrongfulness of an action without reference to individuals.” ’ ’].)

In line with this precedent, and of particular relevance to the case at hand, is the Second District’s opinion in *Jaimez*, *supra*, 181 Cal.App.4th 1286. In *Jaimez*—a case, like this one, involving claims of various wage and hour violations, including meal break

issues—the appellate court concluded that the “trial court misapplied the criteria [for determining whether a class should be certified], focusing on the potential conflicting issues of fact or law on an individual basis, rather than evaluating ‘whether the *theory of recovery* advanced by the plaintiff is likely to prove amenable to class treatment.’ ” (*Id.* at p. 1294.) Since the plaintiff’s theory of recovery focused on uniform policies and practices (such as the defendant’s failure to compensate employees for missed meals, rest breaks, and earned overtime), it was “more amenable to class treatment than individual disposition.” (*Id.* at p. 1300.) Indeed, in *Jaimez*, the defendant had a policy and practice of automatically deducting 30 minutes per shift for each employee’s meal break regardless of whether that meal break was actually taken, and the appellate court expressly found that this policy raised common legal and factual issues. (*Id.* at pp. 1294, 1304.)

Further, in balancing these common issues against any individual inquiries necessary, the *Jaimez* court rejected the trial court’s notion that common questions of fact and law did not predominate because the defendant had submitted declarations indicating that some employees did, in fact, get meal breaks, rest breaks, and proper pay stubs and thus there was a “ ‘strong indication that there could be conflicting testimony regarding whether these employees have common factual issues to be presented at trial.’ ” (*Jaimez, supra*, 181 Cal.App.4th at p. 1296.) Specifically, the appellate court declared that the trial court had improperly “focused on the *merits* of the declarations, evaluating the contradictions in the parties’ responses to the company’s uniform policies and practices, not the policies and practices themselves.” (*Id.* at p. 1300.) Unfortunately, the trial court in this case fell prey to the same errors that infected the trial court’s certification decision in *Jaimez*.

Specifically, instead of identifying the principal legal issues presented in this matter and determining whether those “operative legal principles, as applied to the facts of the case, render the claims susceptible of resolution on a common basis’ ” (*Alberts, supra*, 241 Cal.App.4th at p. 399), the trial court here improperly focused on the minutiae of each individual janitor’s personal situation. This was a legal error and appears also to

have been the reason the trial court found Woolfson's evidence irrelevant to the class certification inquiry. However, when the merits of the ultimate damages issues are set aside and Woolfson's analysis of ABM's payroll practices is considered, along with the other evidence submitted by plaintiffs, it becomes clear that numerous common issues predominate in this matter, rendering class certification appropriate.

For instance, the legality of ABM's uniform payroll policy—which assumes each employee works his or her scheduled shift and takes any legally required meal breaks absent some type of exception report—is a legal question that can be determined by reference to facts common to all class members. Certainly, the evidence provided by Woolfson that a mere 5,625 of the 1,836,083 time entries for ABM Workers he investigated (0.3 percent) contained adjustments to pay calls into question the efficacy of ABM's asserted "timesheet maintenance" procedure, as does the evidence presented by plaintiffs that ABM does not generate exception reports for missed meals periods. Moreover, the legality of ABM's auto-deduct policy for meal breaks in light of the recordkeeping requirements for California employers is also an issue amenable to classwide resolution. (See Cal. Code Regs., tit. 8, § 11050, subd. (7)(A)(3).) In addition, ABM's apparent uniform practice of never providing premium pay to its employees, either for split shifts or missed meal breaks, is susceptible to classwide treatment. Moreover, ABM's defenses with respect to split shift premium pay—that voluntary split shifts are not compensable and that class members are paid more than the threshold under which premium pay is mandated—are also susceptible to common proof. (See *Saechao v. Landry's, Inc.* (N.D. Cal. Mar. 15, 2016, No. C 15-00815 WHA) 2016 U.S. Dist. LEXIS 33409 at pp. \*22–23; *Kamar v. Radio Shack Corp.* (C.D. Cal. 2008) 254 F.R.D. 387, 405; see *Aleman, supra*, 209 Cal.App.4th at pp. 574–575 [interpreting split shift Wage Order as a legal matter].) Finally, whether ABM fails to properly reimburse its employees for work-related travel, despite its asserted policy to do so, is also subject to common proof. (See *Brewer v. General Nutrition Corp.* (N.D. Cal. Nov. 12, 2014, No. 11-CV-3587 YGR) 2014 U.S. Dist. LEXIS 159380 at pp. \*27–30 [predominance of common questions on a travel reimbursement claim supported by evidence of

“exceedingly small percentage of employees who sought reimbursement”; evidence of mileage incurred could be determined on a class-wide basis where all relevant locations known].) Under these circumstances, fear that the determination of individual damages might prove overly complex should not have provided a basis for denial of class certification.

Indeed, although we do not reach the issue, the trial court’s concern regarding the need for numerous individualized damage inquiries in this case may turn out to be over-exaggerated, given existing precedent indicating that the burden of proof shifts to employers “in the wage and hour context when an employer’s compensation records are so incomplete or inaccurate that an employee cannot prove his or her damages.” (*Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1189; see *Cicairos v. Summit Logistics, Inc.* (2005) 133 Cal.App.4th 949, 961 (*Cicairos*) [“ ‘[W]here the employer has failed to keep records required by statute, the consequences for such failure should fall on the employer, not the employee. In such a situation, imprecise evidence by the employee can provide a sufficient basis for damages.’ ”], overruled on another ground as stated in *York v. Starbucks Corp.* (C.D. Cal. Sept. 12, 2012, No. CV 08-07919 GAF (PJWx)) 2012 U.S. Dist. LEXIS 190086.) Thus, for example, since employers have a duty to record their employees’ meal periods, “[i]f an employer’s records show no meal period for a given shift over five hours, a rebuttable presumption arises that the employee was not relieved of duty and no meal period was provided.” (*Brinker, supra*, 53 Cal.4th at p. 1053 [Werdegar, J., conc.]; see Cal. Code Regs., tit. 8, § 11050, subd. (7)(A)(3).) Under such circumstances, a court may award damages, even if they are only approximate and based on statistical sampling. (*Bell v. Farmers Ins. Exchange, supra*, 115 Cal.App.4th at pp. 746–751.)

In summary, given that the classes proposed by plaintiffs in this case were ascertainable and plaintiffs’ allegations presented predominantly common questions, the trial court’s determinations to the contrary cannot stand. Rather, we conclude that the trial court’s denial of class certification—including its decision regarding the admissibility of the Woolfson materials—rested on improper criteria and erroneous legal

assumptions, amounting to an abuse of discretion. Plaintiffs have made a showing sufficient to allow them to take the next step in attempting to prove the merits of their contentions on a classwide basis.<sup>15</sup>

### **III. DISPOSITION**

The trial court's order denying class certification is reversed and the matter remanded for certification of classes as set forth in this opinion. Plaintiffs are entitled to their costs on appeal.

---

<sup>15</sup> In making this determination, we are cognizant of the trial management concerns raised by counsel for ABM at oral argument in this case, issues which may make the ultimate resolution of all or parts of this matter on a classwide basis problematic. However, as detailed above, our review following a denial of class certification is limited. (See *Alberts, supra*, 241 Cal.App.4th at p. 399.) Because the trial court's order was based on improper criteria and erroneous legal assumptions, we reverse. Moreover, based on the record before us and as we have detailed at length above, it appears that plaintiffs have identified a number of common questions suitable for classwide resolution. Should plaintiffs' trial plan subsequently prove unworkable, however, ABM may address any such issues to the trial court.

---

REARDON, J.

We concur:

---

RUVOLO, P. J.

---

RIVERA, J.

**CERTIFIED FOR PUBLICATION**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

ABM INDUSTRIES OVERTIME CASES

JCCP No. 4502

A132387, A133077 & A133695

(City & County of San Francisco  
Super. Ct. No. CJC-07-004502)

ORDER MODIFYING OPINION  
AND CERTIFYING OPINION FOR  
PUBLICATION

(NO CHANGE IN JUDGMENT)

THE COURT:

It is ordered that the opinion filed December 11, 2017, be modified as follows:

The citation to *Cicairos v. Summit Logistics, Inc.* (2005) 133 Cal.App.4th 949 located on page 36 of the opinion shall be modified to delete the reference to subsequent history such that the case citation shall read in full: “see also *Cicairos v. Summit Logistics, Inc.* (2005) 133 Cal.App.4th 949, 961 (*Cicairos*) [“ ‘Where the employer has failed to keep records required by statute, the consequences for such failure should fall on the employer, not the employee. In such a situation, imprecise evidence by the employee can provide a sufficient basis for damages’ ”].)

There is no change in the judgment.

In addition, the opinion in the above matter was not certified for publication in the Official Reports when filed on December 11, 2017. For good cause it now appears that the opinion, as modified herein, should be published in the Official Reports and it is so ordered.

Dated: \_\_\_\_\_

\_\_\_\_\_  
RUVOLO, P. J.

Trial Court: City & County of San Francisco Superior Court

Trial Judge: Hon. Richard A. Kramer

Counsel for Appellants: Weinberg, Roger & Rosenfeld, David A.  
Rosenfeld, Christian L. Raisner, Emily P. Rich,  
Roberta D. Perkins; Mallison & Martinez, Stan  
S. Mallison, Marco A. Palau, Joseph D. Sutton;  
Rastegar & Matern, Matthew J. Matern

Counsel for Respondents: Littler Mendelson, Keith A. Jacoby, Dominic J.  
Messiha, Lauren E. Robinson